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No. 84-1134

In the Supreme Court of the United States

OCTOBER TERM, 1984

GOLDMAR, LTD. AND PANGOLD, LTD., PETITIONERS

v.

GEORGE GREELEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners challenge the court of appeals' order dismissing for lack of jurisdiction their appeal from the district court's partial denial of their Fed. R. Crim. P. 41(e) motion for return of seized property.

1. The IRS is conducting a criminal investigation of an international tax shelter scheme operated by petitioners Goldmar, Ltd., and Pangold, Ltd. (2 R. 41). Pursuant to that investigation, the IRS obtained from a United States magistrate warrants to search petitioners' business premises and to seize certain business records (Pet. 3-4). The affidavits for both warrants were placed under seal on the government's motion (Pet. App. 1b). The searches were conducted on September 14, 1983, and numerous documents were seized (*id.* at 3b).

Shortly thereafter, petitioners filed a motion under Fed. R. Crim. P. 41(e) seeking return of the seized documents. When the district court initially denied their motion (Pet. App. 1b-2b), petitioners moved for reconsideration, reiterating their request for return of the records, and also seeking (1) an order authorizing them to read and copy one of the government's sealed affidavits, and (2) an order enjoining the IRS from examining or duplicating the seized documents or from using them in any future civil or criminal investigation (1 R. 38-43, 60). The district court granted petitioners' motion for reconsideration in part. It ordered the government to return to petitioners the original copies of all documents seized, except those which the IRS could identify as "in good faith subject to examination for authentication"; it ordered the government to provide petitioners with legible copies, suitable for business use, of any originals thus retained; it denied petitioners' request to unseal the affidavit; and it denied petitioners' motion to suppress "without prejudice to [their] right to raise said motion * * * at any future criminal proceeding" (Pet. App. 3b-4b).

Petitioners appealed from the district court's order insofar as it denied their requested relief. The court of appeals, in an unpublished order, dismissed the appeal for lack of jurisdiction (Pet. App. 1a) and denied a petition for rehearing (*id.* at 2a-3a).

2. Petitioners contend (Pet. 6-12) that the court of appeals erred in dismissing their appeal for lack of jurisdiction. As they recognize (*id.* at 6-7), the denial of a Rule 41(e) motion is appealable "[o]nly if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant." *DiBella* v. *United States*, 369 U.S. 121, 131-132 (1962). Petitioners contend that their motion was not tied to an existing criminal prosecution because there has not yet been in this case an "arrest, detention, presentation to a United States Commissioner,

empaneling of a Grand Jury, complaint, release on bail following arrest, arraignment, information, or indictment" (Pet. 9). Petitioners assert (*id.* at 10-12) that the courts of appeals are in conflict as to when a criminal prosecution is "*in esse*" for purposes of the *DiBella* analysis and urge this Court to grant certiorari to resolve the conflict.

Whatever the merit of petitioners' argument as an abstract matter, this case does not present the question they ask the Court to review. *DiBella* sets forth a two-part test for appealability of denials of Rule 41(e) motions: the motion must not be tied to an existing criminal prosecution *and* the motion must be "solely for return of property." See, *e.g., In re Grand Jury Proceedings*, 716 F.2d 493, 495 (8th Cir. 1983). Regardless of how one interprets the former part of the *DiBella* test,[1] petitioners quite plainly failed to satisfy

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[1]As petitioners note (Pet. 10-11), some circuits seem to have interpreted the phrase "criminal prosecution *in esse*" to refer to criminal proceedings that have reached a formal accusatory stage, while other circuits have interpreted it to include earlier, investigatory stages, particularly where a grand jury has already been empanelled. Compare, *e.g., In re Grand Jury Proceedings*, 716 F.2d at 496 & n.4, with *Standard Drywall, Inc.* v. *United States*, 668 F.2d 156, 158 (2d Cir.), cert. denied, 456 U.S. 927 (1982). Whether these decisions may properly be said to conflict is unclear; this Court has regularly denied certiorari despite assertions to that effect. See *Standard Drywall, Inc.*, 456 U.S. at 927; *Simons* v. *United States*, 592 F.2d 251 (5th Cir.), cert. denied, 444 U.S. 835 (1979); *Church of Scientology* v. *United States*, 591 F.2d 533 (9th Cir. 1979), cert. denied, 444 U.S. 1043 (1980). In any event, we agree with those cases holding that investigatory proceedings may satisfy the "criminal prosecution *in esse*" part of the *DiBella* test. Appeals from denials of Rule 41(e) motions in that situation can disrupt orderly criminal proceedings and cause piecemeal review no less than appeals after an indictment has been returned. In the instant case, for example, contrary to petitioners' implication (see Pet. 9, 12), the IRS has nearly completed its investigation of the crimes alleged in the affidavits underlying the search warrants. Petitioners acknowledged below that there was "every indication of a forthcoming indictment" in this case (C.A. Br. 32), and we understand that the IRS Special Agent's report and recommendation with respect to possible indictment will be submitted to the Justice Department shortly.

the latter. Insofar as their motion was one "for return of property," it was granted. The district court ordered the government to return to petitioners the originals of all documents seized, other than those "in good faith subject to examination for authentication" (Pet. App. 3b), and to provide petitioners with legible copies of any originals thus retained. This was done almost immediately.[2] The other relief petitioners requested, which the district court denied, consisted of access to the sealed IRS affidavit, an injunction against IRS examination, duplication, or use of the records in any civil proceeding, and suppression of those records in any future criminal proceeding. But this relief had nothing to do with the return of petitioners' property. The denied portions of their Rule 41(e) motion that petitioners sought to appeal, therefore, far from being "solely for return of property" (*DiBella*, 369 U.S. at 131-132), were in fact solely for other kinds of relief. The court of appeals thus correctly dismissed their appeal for lack of jurisdiction.[3]

3. Contrary to petitioners' assertion (Pet. 12), finally, there is no uncertainty as to the meaning of the words "solely for return of property" as used in *DiBella*. This

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[2]Approximately 211 items (an "item" consisted in some cases of a single record, in other cases of a folder or box of documents) were seized from petitioners. Originals of all but 14 items were returned to petitioners at once, copies being provided of the balance.

[3]While petitioners asserted below that their business suffered harm when the records were seized (C.A. Br. 26, 29, 40), they clearly limited their claim of harm to the period during which the business was without records. Indeed, they could not have alleged that they were suffering any continuing harm on that score, since all the records seized were returned to them, either the originals or copies thereof. See *Standard Drywall, Inc.*, 668 F.2d at 157 n.2. Similarly, petitioners make no claim in this Court that they are unable to operate their business either because of the lack of records or because of the inadequacy of any of the copies they were given. Compare *In re Grand Jury Proceedings*, 716 F.2d at 495-496.

Court and the lower courts consistently have held that whether a pretrial motion is "solely for return of property" depends on its " 'essential character and the circumstances under which it is made.' " *E.g., Carroll* v. *United States,* 354 U.S. 394, 404 n.17 (1957) (quoting *Cogen* v. *United States,* 278 U.S. 221, 225 (1929)); *In re Grand Jury Proceedings,* 716 F.2d at 495 (citing cases); *In re Grand Jury Proceedings,* 604 F.2d 806, 807 (3d Cir. 1979). Although petitioners suggest (Pet. 12) that *Carroll* is at odds with *DiBella,* the latter cited the former with approval. See 369 U.S. at 132 (citing 354 U.S. at 404 n.17). And although petitioners assert that "[t]he circuits are divided on the meaning of the word 'solely' " (Pet. 10), they cite no cases to support that assertion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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